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Supreme Court, U.S.
FILED
AUG 25 2004
OFFICE OF THE CLERK

Case No. 03-931

**IN THE UNITED STATES SUPREME COURT**

STATE OF FLORIDA, *Petitioner,*

v.

JOE ELTON NIXON, *Respondent.*

**********

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

*Certiorari Granted March 1, 2004*

# REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

Nixon affirmatively concedes in his brief that the Florida Supreme Court erred in two respects. First, Nixon acknowledges the Court found trial counsel ineffective *per se* without any demonstration of prejudice. And second, Nixon observes the Court erred in holding that a defendant's silent acquiescence is *per se* insufficient to authorize a defense attorney in a capital case to concede guilt in order to preserve credibility at the penalty phase. Thus, he effectively agrees with the State of Florida that the decision of the Florida Supr e Court is erroneous and must be reversed.

**A. Nixon's "Introduction"**

Nixon complains in his "introduction" that the State of Florida has "reconfigured" the case below "so that his alternative Strickland theory was turned into his *sole* constitutional claim." Brief for Respondent at 24-30.[1]

[1] Petitioner's citations here and in the next paragraph are to Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984); and Boykin v. Alabama, 395 U.S. 238 (1969).

The State of Florida expressly noted in its brief that Nixon had raised both Cronic/Boykin *and* Strickland in the Florida courts. Petitioner's Brief on the Merits at 12-13. Nixon's Cronic/Boykin claim has not been ignored; on the contrary, that claim has been the central focus of disagreement with the Florida Supreme Court's decision, which *granted relief* on that claim and rejected the application of the Strickland standard to Nixon's claim of ineffective assistance of counsel. Petitioner's Brief on the Merits at 32.

Despite arguing strenuously that the issue of whether counsel's performance satisfies the Strickland standard is not before this Court, Nixon devotes a significant portion of his statement of facts to questioning trial counsel's evaluation of the strength of evidence against Respondent. Brief of Respondent at pp. 13-22. However, the state trial court expressly found that the evidence was "overwhelming" (App. 385), and the Florida Supreme Court *expressly agreed* that the evidence was "overwhelming." Nixon II (App. 405).[2] The Florida Supreme Court simply deemed that fact to be irrelevant to its Cronic/Boykin analysis. Nixon cannot dispute these factual determinations at this juncture.[3]

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[2] As noted in Petitioner's Brief on the Merits at p. 1(text and also fn. 1), Nixon II refers to Nixon v. State, 758 So.2d 618 (Fla. 2000), while Nixon III refers to Nixon v. State, 857 So.2d 172 (Fla. 2003).

[3] Even so, the "facts" alleged in Nixon's brief fail to contradict these determinations. Regardless of the credibility of Nixon's brother and ex-girlfriend, Nixon did not confess just to them, but to any number of people, including law enforcement (App. 386). Further, despite any questions about the ground clearance of the victim's MG, or the size of its trunk: (a) Nixon can point to no evidence that the pipeline road near which the victim's body was found was so deeply rutted that the MG could not have negotiated it; (b) witnesses saw Nixon with the victim at her MG in the mall parking lot, driving the MG later that afternoon near the murder scene, and continuing to drive the MG many times over the next couple of days (App. 386); (c) a partly burned tonneau cover was found at the scene of the crime, corroborating Nixon's confessions as well as the presence of the MG at the scene; (d) the State presented credible evidence (TR 1962-65, 2033-35) that Nixon had hidden the



**B. Nixon's trial counsel made a reasonable effort to consult with him**

Nixon argues that the decision of the Florida Supreme Court is fully consistent with this Court's decision in Roe v. Flores-Ortega, 528 U.S. 470 (2000), because, when the court concluded that "'silent acquiescence is not enough,'" it found that Nixon's trial counsel Michael Corin failed to make the "'reasonable effort to discover the defendant's wishes'" required by Roe. Brief of Respondent at 36, citing Roe and Nixon II.

The Florida Supreme Court, however, neither cited Roe nor addressed Petitioner's argument that its holding in Nixon II was inconsistent with Roe. Nor did the court determine that Corin failed to make a reasonable effort to discover the defendant's wishes.

Corin testified without contradiction that he had discussed his planned strategy with Nixon on a number of occasions. Indeed, the state trial court expressly found that trial counsel had "done all he could . . . to tell his client what strategies he intended to pursue," but that Nixon simply "would refuse to respond" (App. 557-60). The Florida Supreme Court did not disagree with this finding, but simply required more: the court imposed an absolute, unbending *per se* requirement that counsel expressly determine his client's wishes before acting. Nixon concedes that the Florida Supreme Court's standard "would probably demand too much of counsel" in the

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MG's spare tire in a wooded area between the mall and the truck route (i.e., on the way to the crime scene), later retrieving it when he had a flat tire. Finally, because the victim's hair and skin (along with her left leg and arm) were completely burned away, the absence of any ligature marks on the victim's neck is insignificant (TR 1940-44). Counsel, through his investigation, was well aware of the pretrial statements and depositions of all of the relevant witnesses. Notwithstanding some minor contradictions in Nixon's statements, counsel's judgment that the evidence was overwhelming and that any dispute about it would be resolved in the State's favor was not unreasonable.

"ordinary" case (Brief for Respondent at 37), but argues that this case is not "ordinary" because he was tried *in absentia*.[4]

The Florida Supreme Court, however, did not condition its holding that "silent acquiescence is not sufficient" upon Nixon's absence from trial, and has not limited its holding to cases in which the defendant has absented himself from trial.[5] See Harvey v. State, 28 Fla. L. Weekly S513 (Fla. July 3, 2003)(pending on motion for rehearing).

Furthermore, Roe holds that counsel has a constitutionally imposed duty to consult the client about whether to appeal only if there is reason to think either (1) that a rational client would want to appeal or (2) his client would want to appeal. 528 U.S. at 480. Roe does not apply a stricter standard either as to the duty to consult or as to the requirement of making a "reasonable effort" to ascertain the client's wishes when the defendant has voluntarily absented himself. In fact, defendants who have absconded may reasonably be assumed to have forfeited their right to appeal. Molinaro v. New Jersey, 396 U.S. 365 (1970); Estelle v. Donough, 420 U.S. 534 (1975). Nixon's voluntary decision to absent himself from most of his trial, conjoined with his refusal to divulge his wishes to counsel despite repeated opportunities to do so, demonstrates that Nixon was *not interested* in choosing any particular trial strategy. Trial counsel made a "reasonable effort" to ascertain his client's wishes. Nixon is entitled to no more.

Trial counsel's performance should have been reviewed for reasonableness and prejudice under Strickland rather than under the Florida Supreme Court's mechanistic formulation of "silent acquiescence is not enough," and its futile "search for words that [Nixon] was clearly disinclined to provide" (App. at 561) (Nixon III dissent, quoting trial court's order denying relief).

### C. Nixon has conceded that counsel's performance should have been reviewed for prejudice

Nixon concedes (Brief for Respondent at 34) that, even if he could establish that his trial counsel failed adequately to consult with him, he would be entitled to relief under his interpretation of Roe if and only if he can demonstrate prejudice–a position entirely contradictory to the opinion of the Florida Supreme Court, which held that no showing of prejudice was necessary if the evidence failed to establish that Nixon expressly consented, in words, to counsel's strategy. Nixon II (App. 402-03).

Nixon argues (Brief of Respondent at 34-35) that the correct standard of prejudice in this case is that which this Court in Roe found applicable when counsel had unreasonably failed to file an appeal, and argues further that he has satisfied that standard. Brief of Respondent at 36. He is wrong on both counts.

Roe holds that even when an attorney has, without adequate justification, failed to consult with the defendant about whether to file an appeal, the defendant has the burden to prove that counsel's performance was prejudicial. The Court noted that, while actual prejudice generally was defined as "a reasonable probability that,

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[4] It is not surprising that a defendant who voluntarily absents himself from proceedings would not have articulated specific wishes. Nixon should not benefit from his affirmative election not to participate during portions of his trial. Rather, by electing this path, Nixon has waived any complaint that he was deprived of an opportunity to express his wishes.

[5] On direct appeal, the Florida Supreme Court upheld the trial court's determination that Nixon should not be forced to attend trial, given the likelihood of prejudice to Nixon resulting from his disorderly conduct in the presence of the jury (Nixon I, App. 366-68) ("A defendant will not be forced to attend his capital trial if his actions or the means used to ensure his presence would prejudice him in the eyes of the jury."), and Respondent does not contend that any issue about the validity of this determination is before this Court now. See Brief for Respondent at 38 (fn. 52). See also, Illinois v. Allen, 397 U.S. 337, 343 (1970) ("trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case").

but for counsel's unprofessional errors, the result of the proceeding would have been different," 528 U.S. at 482 (citing Strickland), the unjustifiable failure to consult with a defendant about whether to file an appeal was "unusual" because "counsel's alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." Id. at 483. "Accordingly," the Court held, "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Id. at 484.

This formulation is inapt here. Nixon had a trial. The reliability of that trial may be disputed by Nixon, but he was not deprived of a trial altogether. Thus, he bears the burden of establishing, not only that his counsel performed deficiently, but also a reasonable probability that, but for such deficient performance, the result of the proceeding would have been different. The Florida Supreme Court erred in relieving Nixon of that burden under a Cronic analysis.

Further, even if Nixon's suggested standard of prejudice were correct, he has not satisfied that standard. He argues that his "not-guilty plea, manifest rage at learning about counsel's concession of guilt, and the manifest availability of grounds for attacking the prosecution's theory of the case" are sufficient to demonstrate "a reasonable probability" that he would have "insisted" on a different strategy if his wishes had been consulted. Brief of Respondent at 36. Nowhere has that occurred, nor has any other "plausible, different strategy" been posited that would have overcome or changed the ultimate result based on the plethora of evidence as to Nixon's guilt.

Nixon has been afforded numerous evidentiary hearings on his claim that counsel conceded guilt without his consent. Throughout, he has declined to testify or present other evidence to show either (a) that counsel failed to consult with him or (b) that he



ever objected to counsel's proposed strategy. And the express findings of the trial court (which the Florida Supreme Court left undisturbed) have consistently been that counsel did consult with Nixon, that counsel did inform him of counsel's planned strategy, and that Nixon *did not* object or insist on another strategy. The record utterly fails to support Nixon's belated claim that he would have insisted on a different trial strategy if he had been consulted and properly informed.[6]

### D. The Florida Supreme Court did not base its decision upon state law

Nixon concedes that, because the right to effective assistance of counsel at issue in this case is "federal, this Court has undoubted authority to define its contours." Brief for Respondent at 40. But, he argues, a state court may "see the need to insist on strict rules for the way in which criminal attorneys perform the duty of consultation recognized in Roe" and may impose limitations on the conduct of defense counsel that "go beyond" what this Court has imposed, as a matter of state law. Brief for Respondent at 40-41.

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[6] Nixon's plea of not guilty is properly seen as no more than an insistence on a trial, which Respondent received. Moreover, as Petitioner noted in its brief (p. 5, fn. 5), it appears that Nixon himself did not personally enter his plea; rather, his counsel filed a not-guilty plea as a "matter of course" without expressed direction from Nixon. The plea, then, cannot be deemed any sort of personal objection to or disagreement with his counsel's strategy. Further, the newspaper account referenced by Nixon has never been submitted as evidence in any evidentiary hearing. As noted in Petitioner's brief (p. 6, fn. 8), Nixon "did not state at the time of the trial, and has not testified since, that he absented himself as the result of, or as a means of protesting, his trial counsel's strategy." In fact, the trial court attempted to ascertain why Nixon was absenting himself, and Nixon declined to answer (TR 335-38). Finally, the alleged availability of grounds to attack the prosecution's case is not only not at issue here, but the record refutes the contention that counsel had any reasonable basis for attacking the State's overwhelming evidence of guilt. See fn. 3 of this reply.

The initial failure of Nixon's argument is that the decision of the Florida Supreme Court was not based upon state law, but was expressly based upon the court's misinterpretation of decisions applying federal constitutional law.

Second, Roe expressly rejected the application of "strict rules" to the performance of counsel in criminal cases. The Florida Supreme Court, like the lower court in Roe, has attempted "to impose mechanical rules on counsel" and, like the lower court in Roe, should be reversed for having done so. Specific guidelines and "detailed rules" for counsel's conduct have "no place in a Strickland inquiry." 528 U.S. at 480-81. For reasons set out in Petitioner's brief (pp. 19-23), trial counsel's strategy in this case was not unreasonable under the circumstances; in fact, a contrary strategy could well have been strategically unwise, and detrimental to Nixon's chances of receiving a life sentence, as the Florida Supreme Court itself recognized. Nixon II (App. 405-06). Trial counsel's strategic judgment in this case did not fall outside the "wide range of competence" we demand of attorneys, and a state appellate court may not, consistently with Strickland and its progeny, prohibit an attorney from adopting reasonable strategies by adopting a mechanical one-size-fits-all *per se* rule.

**E. Nixon's trial counsel did not ally himself with the forces "attacking his client's ship."**

Nixon argues that, by conceding guilt, his counsel "abandon[ed] the ship that the client should be navigating and instead [allied] himself with the forces attacking the ship." Brief for Respondent at 45. It is clear from the record, however, that counsel did not forsake his client or ally himself with the prosecution. Counsel's strategy, undertaken after considerable investigation and preparation and in the face of overwhelming evidence, was "to select the issue that really had to be tried in this case [i.e., sentence] and try that issue" (App. 356) by what counsel deemed to be the most effective means available. Because counsel did not fail to function as an adversary to the prosecution, his actions must be



reviewed under the Strickland standard for deficient performance and prejudice, rather than having been found *per se* deficient and prejudicial by the application of an inflexible rule.

## CONCLUSION

For all the reasons set out in Petitioner's Brief on the Merits and in this Reply, the Florida Supreme Court should be reversed.

Respectfully submitted,

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